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 THE THOMAS KINKADE COMPANY,
 8 FORMERLY KNOWN AS, MEDIA ARTS
 GROUP, INC.

9
 10 UNITED STATES DISTRICT COURT
 11 NORTHERN DISTRICT OF CALIFORNIA
 12 SAN JOSE DIVISION

13
 14 DAVID KAYNE, an individual citizen of
 Georgia,

15 Plaintiff,

16 v.

17 THE THOMAS KINKADE COMPANY,
 18 formerly known as MEDIA ARTS
 GROUP, INC., a Delaware Corporation.,

19 Defendant.

20 CASE NO. C 07-4721 (JF) (RS)

21 **REQUEST FOR JUDICIAL NOTICE IN
 SUPPORT OF THE THOMAS KINKADE
 COMPANY'S MOTION TO DISMISS
 PURSUANT TO F.R.C.P. RULE 12(B)(6);
 DECLARATION OF CHARLES E. WEIR
 IN SUPPORT THEREOF**

HEARING

22 **DATE:** November 30, 2007
TIME: 9:00 a.m.
JUDGE: Hon. Jeremy Fogel

1 TO ALL THE PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE THAT pursuant to Federal Rule of Evidence 201, plaintiff The
 3 Thomas Kinkade Company (“TKC”) hereby respectfully requests that the Court take judicial
 4 notice of the following documents:

5 1. Answering Statement Combined with Counterclaim, dated February 2, 2003, filed
 6 by Plaintiff David Kayne (“Kayne”) in the matter *Media Arts Group, Inc. v. David Kayne, Tracy*
 7 *Kayne, and Kayne Galleries of Georgia, Inc.*, AAA Case No. 74 181 02154 02 SAT. A true and
 8 correct copy of this document is attached to the Declaration of Charles E. Weir In Support the
 9 Request for Judicial Notice in Support of the Thomas Kinkade Company’s Motion to Dismiss
 10 Pursuant to F.R.C.P. 12(b)(6) (the “Weir Declaration”) as Exhibit 1. Such a document is the
 11 proper subject of judicial notice. Fed. R. Evid. 201; *Investor Rels. Servs. v. Michele Audio Corp.*
 12 *of America*, 2006 U.S. Dist. LEXIS 65948, *4-5 (M.D.N.C. July 19, 2006) (holding that a AAA
 13 case file is “capable of accurate and ready determination by resort to sources whose accuracy
 14 cannot reasonably be questioned,” within the meaning of Fed. R. Evid. 201 and therefore subject
 15 to judicial notice).

16 2. Respondent / Cross-Claimants’ Arbitration Brief, dated February 16. 2004, filed
 17 by Kayne in the matter *Media Arts Group, Inc. v. David Kayne, Tracy Kayne, and Kayne*
 18 *Galleries of Georgia, Inc.*, AAA Case No. 74 181 02154 02 SAT. A true and correct copy of this
 19 document is attached to the Weir Declaration as Exhibit 2. Such a document is the proper subject
 20 of judicial notice. Fed. R. Evid. 201; *Investor Rels. Servs.*, 2006 U.S. Dist. LEXIS 65948 at *4-5.

21 3. Reasons For Award, dated July 6, 2004, issued by the arbitration panel *In the*
 22 *Matter of the Arbitration between The Thomas Kinkade Company v. David Kayne and Tracey*
 23 *Kayne and Kayne Art Galleries, Inc.*, AAA Case Number 74 181 021254 02 SAT. A true and
 24 correct copy of this document is attached to the Weir Declaration as Exhibit 3. Such a document
 25 is the proper subject of judicial notice. Fed. R. Evid. 201; *Investor Rels. Servs.*, 2006 U.S. Dist.
 26 LEXIS 65948 at *4-5.

27 4. Concurring and Dissenting Decision of Judge Dandurand, dated June 22, 2004,
 28 issued by the arbitration panel *In the Matter of the Arbitration between The Thomas Kinkade*

1 *Company v. David Kayne and Tracey Kayne and Kayne Art Galleries, Inc.*, AAA Case Number
 2 74 181 021254 02 SAT. A true and correct copy of this document is attached to the Weir
 3 Declaration as Exhibit 4. Such a document is the proper subject of judicial notice. Fed. R. Evid.
 4 201; *Investor Rels. Servs.*, 2006 U.S. Dist. LEXIS 65948 at *4-5.

5 5. Award, dated August 27, 2004 Final Award of the Arbitration Panel, issued *In the*
 6 *Matter of the Arbitration between The Thomas Kinkade Company v. David Kayne and Tracey*
 7 *Kayne and Kayne Art Galleries, Inc.*, AAA Case Number 74 181 021254 02 SAT. A true and
 8 correct copy of this document is attached to the Weir Declaration as Exhibit 5. Such a document
 9 is the proper subject of judicial notice. Fed. R. Evid. 201; *Investor Rels. Servs.*, 2006 U.S. Dist.
 10 LEXIS 65948 at *4-5.

11 6. Defendant's Memorandum in Opposition to Plaintiff's Motion to Confirm
 12 Arbitration Award, dated November 23, 2004, filed in the matter *The Thomas Kinkade Company*
 13 *v. David Kayne et. al.*, filed in the United States District Court for the Northern District of
 14 California Case No. CV-04-0186-MISC (SI). A true and correct copy of this document is
 15 attached to the Weir Declaration as Exhibit 6. This document is the proper subject of judicial
 16 notice. Fed. R. Evid. 201; *Doran v. Eckold*, 409 F.3d 958, 962, fn. 1 (8th Cir. 2005) (court of
 17 appeals took judicial notice of documents filed and orders issued in prior case); *Molus v. Swan*,
 18 2007 U.S. Dist. LEXIS 58997, at *18 (S.D. Cal. Aug. 13, 2007) (taking judicial notice of filings,
 19 and statements contained within filings, in prior California State Court action).

20 7. Declaration of David Kayne in Opposition to Plaintiff's Motion to Confirm
 21 Arbitration Award and In Support of Defendants' Motion to Vacate or Modify Arbitration Award
 22 Pursuant to 9 U.S.C. §§ 10, 11, dated November 23, 2004, filed in the matter *The Thomas*
 23 *Kinkade Company v. David Kayne et. al.*, filed in the United States District Court for the
 24 Northern District of California Case No. CV-04-0186-MISC (SI). A true and correct copy of this
 25 document is attached to the Weir Declaration as Exhibit 7. This document is the proper subject of
 26 judicial notice. Fed. R. Evid. 201; *Doran*, 409 F.3d at 962; *Molus*, 2007 U.S. Dist. LEXIS 58997,
 27 at *18.

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1 8. Order Denying Plaintiff's Motion to Confirm Arbitration Award and Granting
 2 Defendants' Motion to Vacate or Modify Award, dated January 10, 2005, issued by the Hon.
 3 Susan Illston of the United States District Court for the Northern District of California in the
 4 matter *The Thomas Kinkade Company v. David Kayne et. al.*, Case No. CV-04-0186-MISC (SI).
 5 A true and correct copy of this document is attached to the Weir Declaration as Exhibit 8. This
 6 document is the proper subject of judicial notice. Fed. R. Evid. 201; *Doran*, 409 F.3d at 962;
 7 *Molus*, 2007 U.S. Dist. LEXIS 58997, at *18.

8 9. Brief in Support of Motion for Temporary Restraining Order, dated September 13,
 9 2006, filed in filed in the Superior Court of Fulton County State of Georgia matter *David Kayne*
 10 *v. The Thomas Kinkade Company*, File No. 2006CV121748. A true and correct copy of this
 11 document is attached to the Weir Declaration as Exhibit 9. This document is the proper subject of
 12 judicial notice. Fed. R. Evid. 201; *Doran*, 409 F.3d at 962; *Molus*, 2007 U.S. Dist. LEXIS 58997,
 13 at *18.

14 10. Plaintiff's Brief in Response to Defendant's Motion to Compel Arbitration and
 15 Motion to Dismiss, dated November 3, 2006, filed in the matter *David Kayne v. The Thomas*
 16 *Kinkade Company*, United States District Court for the Northern District of Georgia Case No.
 17 1:06-CV-2168-CAP. A true and correct copy of this document is attached to the Weir
 18 Declaration as Exhibit 10. This document is the proper subject of judicial notice. Fed. R. Evid.
 19 201; *Doran*, 409 F.3d at 962; *Molus*, 2007 U.S. Dist. LEXIS 58997, at *18.

20 11. Order, dated March 29, 2007, issued in the matter *David Kayne v. The Thomas*
 21 *Kinkade Company*, Case No. 1:06-CV-2168-CAP by Hon. Charles A. Pannell, Jr. of the United
 22 States District Court for the Northern District of Georgia in the matter. A true and correct copy of
 23 this document is attached to the Weir Declaration as Exhibit 11. This document is the proper
 24 subject of judicial notice. Fed. R. Evid. 201; *Doran*, 409 F.3d at 962; *Molus*, 2007 U.S. Dist.
 25 LEXIS 58997, at *18.

26 12. Second Amended Petition for Declaratory Judgment and Injunctive Relief, dated
 27 April 27, 2007, filed in the matter *David Kayne v. The Thomas Kinkade Company*, United States
 28 District Court for the Northern District of Georgia Case No. 1:06-CV-2168-CAP. A true and

1 correct copy of this document is attached to the Weir Declaration as Exhibit 12. This document is
2 the proper subject of judicial notice. Fed. R. Evid. 201; *Doran*, 409 F.3d at 962; *Molus*, 2007
3 U.S. Dist. LEXIS 58997, at *18.

4 13. Brief of Appellant, dated June 18, 2007, filed in the United States Court of
5 Appeals for the Eleventh Circuit matter *David Kayne v. The Thomas Kinkade Company, Inc.*,
6 USCA Case No. 07-11983-H. A true and correct copy of this document is attached to the Weir
7 Declaration as Exhibit 13. Such a document is the proper subject of judicial notice. Fed. R. Evid.
8 201; *Doran*, 409 F.3d at 962; *Molus*, 2007 U.S. Dist. LEXIS 58997, at *18.

9 14. Brief of Appellant, dated August 20, 2007, filed in the United States Court of
10 Appeals for the Eleventh Circuit matter *David Kayne v. The Thomas Kinkade Company, Inc.*,
11 USCA Case No. 07-11983-H. A true and correct copy of this document is attached to the Weir
12 Declaration as Exhibit 14. Such a document is the proper subject of judicial notice. Fed. R. Evid.
13 201; *Doran*, 409 F.3d at 962; *Molus*, 2007 U.S. Dist. LEXIS 58997, at *18.

14 15. Scheduling Order, dated September 12, 2007, issued in the matter *The Thomas*
15 *Kinkade Company v. David Kayne*, AAA Case Number 74-181-E-000733-06. A true and correct
16 copy of this document is attached to the Weir Declaration as Exhibit 15. Such a document is the
17 proper subject of judicial notice. Fed. R. Evid. 201; *Investor Rels. Servs.*, 2006 U.S. Dist. LEXIS
18 65948 at *4-5.

19 16. The Commercial Arbitration Rules and Mediation Procedures of the American
20 Arbitration Association, as amended and effective September 1, 2007. A true and correct copy of
21 this document is attached to the Weir Declaration as Exhibit 16. This document is “capable of
22 accurate and ready determination by resort to sources whose accuracy cannot reasonably be
23 questioned” and is therefore the proper subject of judicial notice. Fed. R. Evid. 201.

24 17. Order, dated October 3, 2007, issued by the United States Court of Appeals for the
25 Eleventh Circuit in the matter *David Kayne v. The Thomas Kinkade Company, Inc.*, USCA Case
26 No. 07-11983-H. A true and correct copy of this document is attached to the Weir Declaration as
27 Exhibit 17. Such a document is the proper subject of judicial notice. *Doran*, 409 F.3d at 962;
28 *Molus*, 2007 U.S. Dist. LEXIS 58997, at *18.

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2 Dated: October 4, 2007

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DECLARATION OF CHARLES E. WEIR

I, Charles E. Weir, declare as follows:

1. I am a partner with the law firm of McDermott, Will & Emery, LLP, counsel of record for plaintiff The Thomas Kinkade Company (“TKC”). I have personal and first hand knowledge of the facts stated herein, and if called upon, I could and would testify competently thereto.

2. A true and correct copy of Plaintiff David Kayne's ("Kayne") Answering Statement Combined with Counterclaim filed on February 3, 2003 in the matter Media Arts Group, Inc. v. David Kayne, Tracy Kayne, and Kayne Galleries of Georgia, Inc., AAA Case No. 74 181 02154 02 SAT (the "San Francisco Arbitration") is attached hereto as Exhibit 1.

3. A true and correct copy of Respondent / Cross-Claimants' Arbitration Brief filed on February 16, 2004 in the San Francisco Arbitration is attached hereto as Exhibit 2.

4. A true and correct copy of the Reasons for Award issued by the San Francisco Arbitration panel on July 6, 2004 is attached hereto as Exhibit 3.

5. A true and correct copy of Judge Dandurand's Concurring and Dissenting Opinion dated June 22, 2004 is attached hereto as Exhibit 4.

6. A true and correct copy of the San Francisco Arbitration panel's Final Award dated August 27, 2004 is attached hereto as Exhibit 5.

7. A true and correct copy of Kayne's Memorandum in Opposition to Plaintiff's Motion to Confirm Arbitration Award in the matter The Thomas Kinkade Company v. David Kayne et. al., United States District Court for the Northern District of California Case No. CV-04-0186-MISC (SI) (the "Northern California Action") filed on November 23, 2004 is attached hereto as Exhibit 6.

8. A true and correct copy of the Declaration of David Kayne in Opposition to Plaintiff's Motion to Confirm Arbitration Award and In Support of Defendants' Motion to Vacate or Modify Arbitration Award Pursuant to 9 U.S.C. §§ 10, 11 filed November 23, 2004 in the Northern California Action is attached hereto as Exhibit 7.

1 9. A true and correct copy of Hon. Susan Illston Order Denying Plaintiff's Motion to
2 Confirm Arbitration Award and Granting Defendants' Motion to Vacate or Modify Award dated
3 January 11, 2005 is attached hereto as Exhibit 8.

4 10. A true and correct copy of Kayne's Brief in Support of Motion for Temporary
5 Restraining Order in the Superior Court of Fulton County State of Georgia matter David Kayne v.
6 The Thomas Kinkade Company, File No. 2006CV121748 filed on September 13, 2006 is
7 attached hereto as Exhibit 9.

8 11. A true and correct copy of Kayne's Brief in Response to Defendant's Motion to
9 Compel Arbitration and Motion to Dismiss in the matter David Kayne v. The Thomas Kinkade
10 Company, United States District Court for the Northern District of Georgia Case No. 1:06-CV-
11 2168-CAP (the "Georgia Action") filed on November 3, 2006 is attached hereto as Exhibit 10.

12 12. A true and correct copy of Hon. Charles A. Pannell, Jr.'s Order in the Georgia
13 Action dated March 29, 2007 compelling arbitration is attached hereto as Exhibit 11.

14 13. A true and correct copy of Kayne's Petition for Declaratory Judgment and
15 Injunctive Relief in the Superior Court of Fulton County State of Georgia matter David Kayne v.
16 The Thomas Kinkade Company, File No. 2006CV121748 filed April 17, 2007 is attached hereto
17 as Exhibit 12.

18 14. A true and correct copy of the Brief of Appellant in the United States Court of
19 Appeals for the Eleventh Circuit matter David Kayne v. The Thomas Kinkade Company, Inc.,
20 USCA Case No. 07-11983-H (the "Eleventh Circuit Appeal") filed June 18, 2007 is attached
21 hereto as Exhibit 13.

22 15. A true and correct copy of the Reply Brief of Appellant file in the Eleventh Circuit
23 Appeal on August 20, 2007 is attached hereto as Exhibit 14.

24 16. A true and correct copy of arbitrator John J. McCauley's Scheduling Order dated
25 September 12, 2007 in the matter The Thomas Kinkade Company v. David Kayne, AAA Case
26 Number 74-181-E-000733-06 is attached hereto as Exhibit 15.

1 17. A true and correct copy of The Commercial Arbitration Rules and Mediation
2 Procedures of the American Arbitration Association, as amended and effective September 1,
3 2007, is attached hereto as Exhibit 16.

4 18. A true and correct copy of the Eleventh Circuit Court of Appeals' Order dated
5 October 3, 2007 affirming Judge Pannell's order is attached hereto as Exhibit 17.

6 19. I declare under penalty of perjury under the laws of the United States of America
7 that the foregoing is true and correct and that this declaration is executed this 4th day of October,
8 2007 in Los Angeles, California.

Dated: October 4, 2007

McDERMOTT WILL & EMERY LLP

By: _____ /s/
Charles E. Weir
Attorneys for Defendant
THE THOMAS KINKADE COMPANY